

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.13191 of 2017

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Popular Nursing Home through its trustee Abhisek Jaiswal, Ashok Raj Path,
Chauhatta, Patna-800 004.

... .. Petitioner/s

Versus

1. The State of Bihar through the Secretary, Labour & Employment, New Secretariat, Patna.
2. The Commissioner of Labour Department, appellate Authority under Payment of Gratuity Act 1972, New Secretariat, Patna-1.
3. Deputy Labor Commissioner, Authority under payment of Gratuity Act 1972, Bailey Road, Patna-1.
4. Mahabir Ojha S/o Sri Sankar Dayal Ojha C/o Sri Bishram Singh, N/19 Professor Colony, Chitragupta Nagar, Patna- 2.

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr.Vijoy Nandan Sahay, Adv.
For the Respondent/s : Mr.Anil Kumar Singh - GP26

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
ORAL JUDGMENT

Date : 10-07-2019

Heard learned counsel for the parties.

In this case, the petitioner is challenging the order of Deputy Labour Commissioner cum Controlling Authority dated 28.9.2011 in G.A. Case No. 4 of 2007, whereby and whereunder, he has assessed the amount of Rs. 1,36,358/- as an amount of gratuity and directed for payment of the same along with 10% simple interest within a period of thirty days. The petitioner has further challenged the order passed by the Labour Commissioner, Bihar cum Appellate Authority dated 11.2.2014 passed in Appeal Case No. 1 of 2011 who has affirmed the order passed by the Deputy Commissioner cum Controlling Authority.



The present case has a chequered history as Mahabir Ojha, respondent no.4 and the petitioner which is a nursing home has been litigating from 1981 as Mahabir Ojha was dismissed from service while discharging as a Cashier cum Manager and since then they are fighting litigation in one form or the other under different forums and the present matter relates to the amount payable to Mahabir Ojha by way of gratuity.

The short fact of this case is that Mahabir Ojha was appointed as a Cashier cum Manager on 29.5.1973 who was dismissed from service on account of charges leveled against him of defalcation of money of the petitioner, a nursing home. Mahabir Ojha challenged the order of dismissal by filing a complaint application under Section 26 of the Bihar Shop and Establishment Act claiming that the order of dismissal is bad in law and he should be reinstated in service with back wages which was registered as BSE Case No. 18 of 1981. When the Labour Court after recording the evidence found that the dismissal was bad in law and vide judgment and order dated 27.3.1992, the same was set aside. As per claim of the petitioner, Mahabir Ojha did not join duty and, on that account, the petitioner was compelled to publish notice in the daily newspaper dated 24.3.1992 informing that he failed to join the duty as per judgment of the Labour Court, Patna



dated 27.3.1992 and if he would not join by 4.5.1992, he would lose his lien, right and title on his job but, even after publication of the notice in the newspaper, Mahabir Ojha did not join which compelled the petitioner management to dispense of his service again and the same was published in the newspaper dated 6.5.1992. In the said notice, it has been mentioned that Mahabir Ojha was hereby informed that as he did not join his duty till 4.5.1992 in spite of notice to join as per the judgment of the Labour Court, Patna dated 27.3.1992, as notified in Hindustan Times dated 24.3.1992, he has lost his lien, right and title on his post with effect from 5.5.1992. So, as per petitioner, as Mahabir Ojha did not join the post, that led to losing the lien and resulted into termination of service. Mahabir Ojha under Section 28 of the B.S.E. Act filed a case for computation of his entitlement of his salary in terms of the order passed by the Labour Court in proceeding under Section 26 vide BSE Case No. 28 of 1992. The Labour Court has passed the order in favour of Mahabir Ojha and, thereby, calculated the amount of Rs.91,242.33/- made him entitled of such amount. The relevant part of the order is as follows:-

“18. Claim No. 5 & 6 :- This claim relates a basic pay July-1981 to August-1992 of the amount of Rs. 154738.00 paise (Rs. One



Lakh Fifty Four Thousand Seven Hundred Thirty Eight only). ”

“The claim chart annexure-1 shows I.A. from July 1981 to August 1992 to be Rs. 33502/- only (Rs. Thirty Three Thousand and Five Hundred Two only). ”

Against that, the order passed by the Labour Court in a proceeding under Section 28, the petitioner as well as Mahabir Ojha filed appeal vide Appeal No. 1 of 2003 (by the petitioner management) which was dismissed and the appeal filed by Mahabir Ojha was Appeal No. 2 of 2003 which was partly allowed after condoning the delay. The order passed by the Appellate Authority was challenged by the petitioner as well as Mahabir Ojha vide C.W.J.C. No. 11268 of 2009 (by the petitioner management) and CWJC No. 14384 of 2009 (by the employee), both the writ applications were rejected vide order dated 25.2.2011, with respect to Mahabir Ojha, the Court dismissed the writ application on the ground that the Appellate Authority is not a court, does not have a power and jurisdiction to condone the delay. Both the parties were not satisfied with the outcome of the writ applications and both of them challenged the aforesaid judgment in L.P.A. No. 583 of 2011 arising out of C.W.J.C. No. 14384 of 2009 (by the management) and L.P.A. No. 606 of 2011 arising out of C.W.J.C. No. 11268 of 2009 (by Mahabir Ojha). The L.P.A.



filed by the Management petitioner was dismissed and the L.P.A. filed by Mahabir Ojha was allowed holding that apart from the 50% of Rs. 91,242/- deposited by the petitioner in L.P.A. No. 606 of 2011 in pursuance to the order passed on 27.7.2011, they are directed to deposit the remaining 50% with the Registrar General of this Court along with interest at the rate of 8% per annum with effect from 17.9.1992 till deposit of the entire amount. The amount of interest shall be calculated on the entire amount of 91,242/- and deposited with the Registrar General of this Court within a period of three weeks from today. While passing the order dated 3.10.2017, the Court has recorded as follows:-

“----- Except for contending that after the orders passed by the Labour Court when the respondent employee did not join, paper publications were made and his services were terminated, no document has been brought on record to indicate as to how and in what manner notice was issued to him directing him to join duties after the orders were passed by the Labour Court, who took the decision to terminate his services, what were the proceedings held before directing him to join duties which finally culminated in passing the order of termination and the Paper publication. Except for bringing on record two Paper publications, no other document or show cause notice, letter or communication is available directing the workman to report for duty. On the contrary, when the matter was considered by the Labour Court in B.S.E. Case No.28/92 and in the statement of the employee recorded on 24th of October, 1995 vide Annexure 3 to the counter affidavit, the employee speaks about his going to join duties, the act of the employer in not permitting him to join.



When the employee came to depose, he was not confronted as to why he did not join duties when notices were issued to him. The only question put to him was as to whether he has challenged the 2nd termination and his answer is that he has not challenged the same as he was not aware of his termination.”

In the aforesaid observation, the Court has taken note of the fact that there was no proceeding showing in what manner the services of Mahabir Ojha was terminated and it was not known to any person what was the proceeding was conducted which finally culminated in passing the order of termination and paper publication except brining on record two paper publications and no other documents or show-cause notice or letter of communication was brought to the notice before the court showing giving direction to Mahabir Ojha to report for the duty. It has also been recorded that the employee speaks about his going to join duties, the act of the employer in not permitting him to join. When the employee came to depose, he was not confronted as to why he did not join duties when notices were issued to him. The only question was put to him as to whether he has challenged the 2nd termination and he replied that he has not challenged the same as he was not aware of his termination and, finally, this Court has allowed the appeal of Mahabir Ojha and rejected the appeal of the petitioner management. This order of appeal was arising out of proceeding started under Section 28 of the Bihar Shop and Establishment Act



which envisage calculation of the amount of due salary. Mahabir Ojha has filed the gratuity application on 11.4.2007 stating therein that he has attained the age of superannuation i.e. 58 years on 31.5.2005, has claimed that the gratuity as per the duty of his superannuation and, accordingly, the controlling authority and the appellate authority has accepted the plea of Mahabir Ojha and calculated the amount of gratuity as mentioned herein above.

Learned counsel for the petitioner submits that Mahabir Ojha cannot claim the gratuity after the period of second termination as the services of the petitioner was terminated with effect from 6.5.1992. The petitioner has drawn attention of this Court towards the evidence which he has given in G.A. Case No. 4 of 2007 wherein he has accepted that during proceeding of Section 28, he could know about his termination but, he has not gone to any Court against that action of the petitioner management. He has further drawn attention that he had stated that he had not discharged the duty for a single day as he was not allowed to join the same. Further he has drawn attention of this Court towards the deposition of Mahabir Ojha which he has given in BSE Case No. 9 of 1994, in course of cross-examination, he has stated that he has claimed arrear of salary for the period September, 1992 to February, 1994. The management has got the notice published on



24.3.1992 and 6.5.1992 in Hindustan Times but, he has no knowledge of the same but, he could get knowledge this notice during the court proceeding.

Learned counsel for the petitioner has submitted that the petitioner was terminated from service which was known to him and, as such, he cannot claim the amount of gratuity for the period after second letter of termination. It has further been submitted that the petitioner has filed four cases under Section 28 vide B.S.E. Case No. 9 of 1994, B.S.E. Case No. 19 of 1995, B.S.E. Case No. 36 of 1995 and B.S.E. Case No. 4 of 2010 and all are pending for adjudication and submitted that the orders passed by the Controlling Authority and the Appellate Authority suffer error of fact and law which is clear on the face of record on account of the fact that the Authority has taken into consideration the period after the order of second termination till the age of 58 years which is completely blatant error, requires interference of this Court.

Learned counsel for the workman has argued that the present writ application has been filed after delay of three years, suffers from delay and laches and, as such, it is a fit case to be dismissed on the aforesaid ground.

It has further been submitted that the amount which has been allowed beyond the period of termination i.e. 6.5.1992 as the



payment has been made up to August, 1992 which has been allowed by the Appellate Authority and the same has been approved by this Court in the order passed in the LPA which itself shows that this Court has not taken cognizance of the second order of termination treating that Mahabir Ojha was all along in service even after second termination. In view of the such finding of this Court, in the LPA proceeding arising from the proceeding under Section 28 of the Bihar Shop and Establishment Act and, as such, the Controlling Authority as well as the Appellate Authority has rightly treated Mahabir Ojha that he was never terminated from service and, as such, he is entitled to gratuity till the age of superannuation i.e. 11.4.2007.

In view of the aforesaid discussion, it has to be decided as to whether the order of the Controlling Authority as well as the Appellate Authority suffers from any illegality in view of the fact that the petitioner has claimed that he was terminated from service second time which was not challenged any where and, as such, there will not be any presumption of continuation of service after that period taking into consideration of the period by the Controlling Authority is per se illegal, perverse and it requires interference.



Before arriving to a final conclusion of the legality and validity of the order passed by the Controlling Authority cum Appellate Authority, it will be essential to consider and examine the matrix of previous proceeding connecting the services of Mahabir Ojha as he was dismissed from service earlier which was challenged before the Labour Court which he succeeded, finally, in setting aside the order of dismissal and, at later stage, he filed application for computation of his entitlement of salary as provided under Section 28 of the Bihar Shops and Establishments Act and, finally, this Court found the claim of Mahabir Ojha to be genuine. It is not very much necessary to examine the proceedings connected with the dismissal of Mahabir Ojha but, the proceeding under Section 28 of the Act has relevance in connection with the present proceeding. After final success of Mahabir Ojha, the petitioner management has come out with a paper publication and asked Mahabir Ojha to join the duty stating therein that he failed to join the duty till 4.5.1992. When he did not finally join the duty, a further publication was made in the shape of final notice that he has lost his lien on account of being remaining absent without any reasonable cause and, thereby, terminated the services. Admittedly, that second termination, as per Management, was not the subject matter of adjudication before any court or tribunal but, Mahabir



Ojha under Section 28 of the B.S.E. Act filed an application vide Case No. 28 of 1992 for computation of salary for the period July, 1981 to August, 1992 as Claim No. 5 & 6. The Labour Court in his judgment taken note of the period of claim and allowed the claim up to 6.5.1992 for Rs. 78,719.00/- at the rate of Rs. 595 per month. The same was challenged before the appellate authority by Mahabir Ojha in BSE Appeal No. 3 of 2003 and the appellate authority disallowed the part Claim No. 9 in connection with BSE Case No. 28 of 1992 and rest claim of Mahavir Ojha was allowed which includes the period from May to August, 1992 which is apparently clear from Paragraph no.14 of the order passed in connection with BSE Appeal No. 1 of 2003 and BSE Appeal No. 3 of 2003 which reads as follows:-

“In the result I find that B.S.E. Appeal No.1 of 2003 is fit to be dismissed and accordingly the same is hereby dismissed on contest. I find that B.S.E. Appeal No. 3 of 2003 is fit to be allowed but in part claim No.9 of B.S.E. Case No. 28/92 is disallowed. Accordingly it is held that the applicant in B.S.E. Appeal No. 3 of 2003 is entitled to recover Rs. 2,97,625/- (Rs. Two lacs Ninety seven thousand six hundred twentyfive) only from the employer.”

As it is apparently clear from the order of appellate authority, only part claim of Item No. 9 was disallowed and the claim of salary for the period July-1981 to August-1992 is the claim of Item No. 5 & 6. So, naturally, it shows that the appellate



authority has allowed the claim of Mahabir Ojha from May to August, 1992 i.e. the period of purported termination of service of Mahabir Ojha which attained its finality by the order passed in LPA No. 583 of 2011 and the LPA Bench, while considering the claim of entitlement vide order dated 3.10.2017 having held that no document was brought on record to indicate as to how and in what manner notice was issued to him directing him to join the duties after the order was passed by the Labour Court, after failure to join the duty, took a decision to terminate the service, what proceedings held, before passing the order of termination and the paper publication. Except bringing on record two paper publications, no other document was brought such as show cause notice, communication of letter directing Mahabir Ojha to report for the duty. So, in nutshell, the Court has found that hardly any substantial material has been brought to indicate the manner of inflicting the punishment of dismissal to Mahabir Ojha and, finally, this Court, in Division Bench, has given a final seal to the judgment of the Appellate Authority which allowed the salary from May to August, 1992 and this order has attained finality, that itself depicts the Management itself has tacitly accepted of continuance of service of Mahabir Ojha even after the purported notice of termination of service, that itself is the evidence of



having not given effect to the order of termination. Had there been an effect, the Management must have challenged before the higher level but, acceptance of Division Bench itself reflects the termination of Mahabir Ojha was not affected by the purported publication of notice.

No matter, the gratuity, he has claimed to have superannuated from service on 31.12.2005 and the Controlling Authority has accepted the plea of Mahabir Ojha of his continuation of service and, finally, retired on reaching the age of superannuation. The counsel for the petitioner as has been informed that Mahabir Ojha has filed an application for computation of arrear of salary under Section 28 of the B.S.E. Act for different period is pending adjudication. This Court would not wait to the possible outcome of that proceeding for computation of the amount but, for the present, gratuity can be claimed after reaching the age of superannuation, is the basis for the present case. It is also a fact that in connection with purported notice of termination, substantial material has been brought by the Management. If that notice having been disproved, in that event, the termination of service of Mahabir Ojha lost in oblivion in view of the order of LPA Bench, in that circumstances, clear field is available to Mahabir Ojha for claiming salary for rest period of



service. It is another aspect of the matter that Mahabir Ojha has been litigating with the petitioner establishment for years together and, every time, it was not easy for him to get share in the cake but, ultimately, he was deprived of joining the service even after failure of the petitioner to prove the charge of misconduct of Mahabir Ojha in misappropriation of fund. When a substantial justice has been done, in that event, it will be travesty of justice to interfere with the order of appellate authority as well as the Controlling Authority in view of the judgment in the case of A.M. Allison & H.P. Brigg. Vs. B.L. Sen & Ors. reported in AIR 1957 SC 227, para-17, Om Prakash Goel Vs. Committee of Management, Kunwar R. C. Mahila Degree College, Mainpuri Vs. Vice Chancellor, Agra University & Anr. reported in 1991 LIC 1493, in the case of Krishna Chandra Pallai Vs. Union of India & Anr. reported in 1992 LIC 2023 and in the case of Chandra Singh & Ors. Vs. State of Rajasthan & Anr. reported in 2003 (6) SCC 545 para-43.

It will be proper to quote paragraph no.17 of the aforesaid judgment in the case of A.M. Allison (supra) which reads as follows:-

“17. There are moreover special reasons why we should not interfere with the orders of the Deputy Commissioner, Sibesar, in these appeals. The matters do not come to us by way of appeal directly from the orders of the Deputy Commissioner,



Sibsagar. They were the subject, in the first instance, of proceedings under Article 226 of the Constitution in the High Court of Assam. Proceedings by way of certiorari are “not of course”. (Vide Halsbury's Laws of England, Hailsham Edn., Vol. 9, paras 1480 and 1481, pp. 877-878), The High Court of Assam had the power to refuse the writs if it was satisfied that there was no failure of justice, and in these appeals which are directed against the orders of the High Court in applications under Article 226, we could refuse to interfere unless we are satisfied that the justice of the case requires it. But we are not so satisfied. We are of opinion that, having regard to the merits which have been concurrently found in favour of the respondents both by the Deputy Commissioner, Sibsagar, and the High Court, we should decline to interfere.”

In view of the above discussion, this Court does not find any error in the order giving direction for making payment of gratuity.

Hence, this petition stands dismissed.

(Shivaji Pandey, J)

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AFR/NAFR	NAFR
CAV DATE	NA
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